



National Indian Business Association

725 Second St., N.E., Washington, D.C. 20002

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Mr. Ronald Poussard
Deputy Director of Defense Procurement for Defense Acquisition
Defense Acquisition Regulations Council
IMD 3D139, PDUSD(AT&L)
3062 Defense Pentagon
Washington, D.C. 20301-3062

email: ronald.poussard@osd.mil
Fax: (703) 602-0350

Dear Mr. Poussard:

At this time, the National Indian Business Association representing 24,000 American Indian and Alaska Native businesses submits the following Tribal comments with respect to DFARS Case 2002-D013, regarding the types of contracts eligible for the Indian Incentive Program (IIP). Although we agree with the DAR Council that all contracts are eligible for the (IIP) and that further clarification is necessary, we are extremely concerned with the widespread confusion regarding the interpretation of DFARS 52.226-7001 with respect to the separate and distinct contract "adjustment" regulation established by Sections (e) (1), (2), (3), and (5) and the "incentive payment" regulation established by Section (e)(4). Without the adjustment regulation that is currently in place, very few, if any Indian-owned economic enterprises could compete for supply subcontracts at pricing levels equal to a non-Indian source. Fortunately, the Congress via the United States Code provides specific direction regarding the recognized financial hardships and socioeconomic realities regarding American Indian subcontracting.

Although for over ten years, DFARS 52.226-7001 Sections (e) (1), (2), (3), and (5) have been specifically established to provide an equitable "adjustment" to the Contractor in order to cover the increased cost of subcontracting with an Indian organization or Indian-owned economic enterprise, if the cost exceeded the cost of acquiring the supplies or services from a non-Indian source, there is still much confusion with respect to this provision of the (IIP) by the Contracting Officer, the public, and the Tribes. Even though the (IIP) equitable "adjustment" language was illogically abridged under the supervision of Robert Neal, Jr., the former Director of the DoD OSADBU, the purview of the long standing "adjustment" provision and the purview of the separate "incentive payment" provision remains in full effect within the existing DFARS rule. While there remains extensive confusion with respect to DFARS 52.226-7001 Sections (e) (1), (2), (3), and (5), these sections exist for no other purpose but to provide for the known increased expense of subcontracting to small disadvantaged Indian firms and Tribes. Specifically, the language provides that any Contractor that can prove that the expense of subcontracting to an Indian firm exceeds the cost of subcontracting to a non-Indian source, by not more than 5%, may receive an equitable "adjustment" to their contract to cover this marginal expense. However, Section (e) (3) specifically states that the Contractor has the "burden of proving" that the cost of acquiring supply items from an Indian firm exceeds the cost of acquiring supply items from a non-Indian source, in order to qualify for the equitable "adjustment" provision. As a result, the Contractor may not acquire supply items from an Indian firm at a price greater than 5% above a price than had the Contractor acquired the supply items from a non-Indian source.

Tel. (202) 547-0580 Fax (202) 547-0589 Email: niba@nibanetwork.org

Website: www.nibanetwork.org

While the "incentive" regulation established by Section (e) (4) is distinct and separate from the "adjustment" provision provided within Sections (e) (1), (2), (3), and (5), there is much confusion at the Contracting Officer level with respect to the two distinct "adjustment" clause and "incentive" clause regulations. At this time, the existing DFARS language does not require a Contractor to obtain an "adjustment" under the (IIP) in order to qualify for the "incentive" payment established within Section (e)(4). Explicitly, Section (e) (4), based on the sole condition of the availability of funds, provides for an "incentive payment" to be paid to the Contractor equal to 5% of the amount paid to the Indian firm by the Contractor. Based on the existing conditions of the separate "adjustment" provision and separate "incentive" provision, it is at the Contractor's sole discretion as to whether or not the Contractor seeks approval for a 5% "adjustment" to be made to the contract. If the Contractor cannot prove that the cost of subcontracting to an Indian firm exceeds the cost of acquiring supplies or services from a non-Indian source, then the Contractor would not be eligible for the "adjustment" provision of the (IIP). However, even though a Contractor may not be eligible for an "adjustment" to the contract or may not even choose to seek an "adjustment" to the contract, based on Section (e) (4), the Contractor explicitly remains qualified for the 5% "incentive payment" for each dollar of business subcontracted to an Indian company. The relationship of the "adjustment" provision to the "incentive" provision, based on the existing DFARS regulation, by established statutory definition is mutually exclusive.

To support the initial development of the separate "adjustment" regulation and the separate "incentive" regulation within the (IIP), the DAR Council and the Civilian Agency Acquisition Council have previously invoked the statutory authority granted to the two Council's within 15 USC 14A Sec. 637(b), which instructs that it shall be the duty of the Administration (DAR Council) to take action to encourage the letting of subcontracts by Contractors to small-business concerns, at "prices and on conditions and terms which are fair and equitable." Under the (IIP), in order to ensure that subcontracts to Indian firms are at "prices and on conditions and terms which are fair and equitable" to the Indian firm, the DAR Council and the CAA Council intentionally implemented the "adjustment" regulation, which has come to be known as the "equitable adjustment" (see FAC 90--27 5/31/95). Incidentally, the [Indian Nation] believes that the DAR Council and the CAA Council's decision to create an "equitable adjustment" provision for the (IIP) was an excellent policy decision when the regulation was first developed over ten years ago, and we are equally as confident that the DAR Council's decision to keep this "adjustment" provision in effect, is even more necessary at the present time.

Although 15 USC 14A Sec. 637(b) requires the DAR Council to take action to encourage Contractors to subcontract to small-business concerns at prices and on conditions which are "fair and equitable," with respect to subcontracts awarded to Small Disadvantaged Businesses and Indian Tribes, based on 15 USC 14A Sec. 637(a)(1)(A), the Congress has offered statutory guidance as to the definition of "fair and equitable" pricing, with respect to similar preferential treatment subcontracting specific programs. To define "fair and equitable" pricing, with respect to Small Disadvantaged Businesses and Indian Tribe subcontracting, the Congress offers specific guidance within 15 USC 14A 637 (3)(B)(iii). In this section of the United States Code, the Congress requires that subcontracts to SDB's and Indian Tribes, be offered at "fair market price." The Congress defines "fair market price" as, "the estimate of a current fair market price for a procurement requirement that has a satisfactory procurement history shall be based on recent award prices adjusted to insure comparability." Congress further requires that, "such adjustments shall take into account differences in quantities, performance times, plans,

specifications, transportation costs, packaging and packing costs, labor and materials costs, overhead costs, and any other additional costs which may be deemed appropriate.”

As the DAR Council is aware, based on the 2003 DoD Appropriations Act, the Indian company must now be the actual manufacturer, in whole or in part, of the commercial items supplied by the Indian firm in order to qualify a contractor to receive the 5% “incentive” payment under the (IIP). Now, more than ever, there will be significant costs by the Indian company associated with being a small disadvantaged manufacturer of the commercial items supplied, such as increased overhead costs, increased labor and material costs, and other additional increased costs associated with being a small disadvantaged manufacturer of commercial items. Based on the statutory authority established by Congress via the United States Code, such cost differences must be taken into account by the DAR Council to “insure comparability,” by DoD Contractors, for items acquired from small disadvantaged Indian manufacturers versus items acquired from non-Indian sources. Therefore, it is essential to the (IIP) that the DAR Council clearly defines the “adjustment” provision and the “incentive” provision within DFARS 52.226-7001 Section (e), in order to eliminate any confusion by the Contracting Officer, the public, and the Tribes.

Although DFARS 52.226-7001, at the present time, provides for a separate equitable “adjustment” provision and a separate “incentive payment” provision, the [Indian Nation] offers a formal request for the DAR Council to clarify this DFARS rule to eliminate any further confusion with respect to the implementation of these two separate provisions within the (IIP). We are extremely confident that a minor clarification that does not alter the intent of the existing DFARS regulation, in order to clarify the long standing historical difference between the “adjustment” regulation and the “incentive” regulation, would clearly be within the guidelines established by Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency, 227 U.S. App. D.C. 201 (D.C. Cir. 1983), and should not require a separate public comment period. However, any final rule issued by the DAR Council in which the “adjustment” language and the “incentive” language was commingled to eliminate the two separate long standing, historical provisions of the (IIP), for the very first time, would almost certainly require a separate public comment period and would be inconsistent with the Small Refiner decision. Also, the abolishment of these two separate historical provisions of the (IIP) for the very first time, would almost certainly require the development of an Initial Regulatory Flexibility Analysis, because the elimination of the “adjustment” provision intended to cover the increased cost of acquiring supply items or services from an Indian firm, would be devastating to the (IIP) and would be considered a “material change” to both the existing and the proposed DFARS regulation.

In order to clarify the existing DFARS equitable “adjustment” regulation and the “incentive payment” regulation, while remaining within the guidelines as established by the Small Refiner decision, we recommend that the following DFARS changes be made as soon as possible, in order to minimize any confusion by the Contracting Officer, the public, and the Tribes. Our recommended changes to the proposed DFARS rule have been “[bracketed]” to simplify the DAR Council’s review of this fair and reasonable request. We have also included the existing language of Section (e) (5), in our proposed DFARS clarification to make sure that this clause is not inadvertently eliminated from the final rule, because it is so important to the (IIP):

UTILIZATION OF INDIAN ORGANIZATIONS AND INDIAN-OWNED ECONOMIC ENTERPRISES--DOD CONTRACTS (SEP 2001[DATE])

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(e)(1) **[If the cost of subcontracting with an Indian organization or Indian-owned economic enterprise exceeds the cost of acquiring the supplies or services from a non-Indian source,]** the Contractor, on its own behalf or on behalf of a subcontractor at any tier, may request an adjustment under the Indian Incentive Program.

(2) The amount of the adjustment that may be requested is 5 percent of the estimated cost, target cost, or fixed price included in the subcontract at the time of award to the Indian organization or Indian-owned economic enterprise.

(3) The Contractor has the burden of proving the amount claimed and must assert its request for an adjustment prior to completion of contract performance.

(4) **[Independent of an adjustment,]** the Contracting Officer, subject to the terms and conditions of the contract and the availability of funds, will authorize an incentive payment of 5 percent of the estimated cost, target cost, or fixed price included in the subcontract awarded to the Indian organization or Indian-owned economic enterprise.

(5) If the Contractor requests and receives an adjustment on behalf of a subcontractor, the Contractor is obligated to pay the subcontractor the adjustment.

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In the event that the DAR Council does not accept the [Indian Nation's] Tribal request for clarification to this rule and does not agree to effectuate these or similar minor clarifications to this proposed DFARS rule, at this time, based on Executive Order 12866 Section 1(b)9, Executive Order 13175, and the 1998 DoD "Native American Alaskan Native" policy, we formally request that the DAR Council "Consult and Coordinate" with the [Indian Nation], before promulgation of this final rule, so that we may examine the rule to ensure that the DFARS language does not have a deleterious impact upon our Tribe or our Tribal members. We remain,

Respectfully yours,



Pete Horner
President/CEO